

## Explanatory Statement

### Acts Interpretation Act 1901

### Civil Aviation Safety Regulations 1998

### Part 138 MOS Amendment Instrument 2021 (No. 1)

#### Purpose

The *Part 138 MOS Amendment Instrument 2021 (No. 1)* (the **MOS amendment**) amends the *Part 138 (Aerial Work Operations) Manual of Standards 2020* (the **MOS**).

The MOS, which commences on 2 December 2021, sets out the operational, procedural and safety risk management standards for the conduct of aerial work operations in aeroplanes and rotorcraft. The MOS was made under regulation 138.020 of Part 138 of the *Civil Aviation Safety Regulations 1998 (CASR)*. It consolidates the existing rules and contains some new rules to enhance operational flexibility and improve aviation safety.

The MOS amendment, which also commences on 2 December 2021, is necessary to make a number of miscellaneous minor or machinery amendments to the MOS. Their purpose is to make a range of clarifications, corrections and updates to the MOS, and to relocate provisions into the MOS that are located in Civil Aviation Orders or other instruments that currently exist and are in force, some of which were previously embodied in the MOS but with errors or omissions. These MOS amendments do not substantially alter the existing arrangements, whether as provided for by the MOS with effect on and from 2 December 2021, or as would be provided for on that date by those other instruments if they continued to exist transitionally and independently of the MOS.

#### Legislation

The *Civil Aviation Act 1988* (the **Act**) establishes the regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.

Subsection 98 (1) of the Act provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. The *Civil Aviation Regulations 1988* and CASR are made under the Act.

The *Civil Aviation Safety Amendment (Part 138) Regulations 2018 (Part 138 of CASR)* were registered on 18 December 2018, and amended by the *Civil Aviation Legislation Amendment (Flight Operations—Miscellaneous Amendments) Regulations 2020* registered on 6 October 2020. Part 138 of CASR commences on 2 December 2021. Under regulation 138.020 of CASR, the Civil Aviation Safety Authority (**CASA**) may issue a Manual of Standards for Part 138 of CASR that prescribes matters required or permitted by that Part to be prescribed, or necessary or convenient for carrying out or giving effect to Part 138. This power is complemented by other provisions throughout Part 138 which empower CASA to prescribe specific matters in the MOS.

Section 4 of the *Acts Interpretation Act 1901* (the **AIA**) as applied by section 13 of the *Legislation Act 2003* (the **LA**) provides, among other things, that if an Act (including a regulation) is enacted and at a time after its enactment (the **start time**) the Act will confer power to make an instrument, that power may be exercised before the start time as if the relevant commencement had occurred. However, in general terms, the exercise of this power does not confer a power or right to impose an obligation on a person before the relevant commencement. Using section 4 of the AIA, the MOS is made under regulation 138.020 of CASR, a regulation that will not commence until 2 December 2021.

The MOS amendment is made under the same head of power, and on the same basis, as the MOS itself.

For convenience in this Explanatory Statement, unless a contrary intention appears, mention of a provision with the prefix “138.” is a reference to that provision in Part 138 of CASR.

More details about the minor or machinery MOS amendments are set out in Appendix 2 of this Explanatory Statement.

### ***Legislation Act 2003***

Under subsection 8 (4) of the LA, an instrument is a legislative instrument if it is made under a power delegated by the Parliament, and any provision determines the law or alters the content of the law, and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right. The MOS satisfied these requirements and, consequentially, the MOS amendment also does so.

Under paragraphs 98 (5A) (a) and (5AA) (a) of the Act, an instrument made under regulations is a legislative instrument if it is issued in relation to matters affecting the safe navigation and operation of aircraft, and is expressed to apply to classes of persons.

On each of these criteria, the MOS was a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Consequentially, the same provisions and conclusions apply to the MOS amendment.

As the instrument relates to aviation safety and is made under CASR, Part 4 of Chapter 3 of the LA (the sunset provisions) does not apply to the instrument (as per item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). The instrument deals with aviation safety matters that, once identified, require a risk response or treatment plan. As such, the instrument is intended to have enduring operation and it would not be appropriate for it to be subject to sunset.

The exemption from the sunset provisions affects parliamentary oversight by not requiring the instrument to be remade at the end of the sunset period (remaking would have the effect that the whole instrument must be re-tabled and would become subject to disallowance in the Parliament under sections 38 and 42 of the LA). However, it is likely that, over time, further MOS amendments will be made and these will be subject to tabling and disallowance in the Parliament in the normal way.

### **Incorporations by reference**

Under subsection 98 (5D) of the Act, the MOS may apply, adopt or incorporate any matter contained in any instrument or other writing. A non-legislative instrument may be incorporated into a legislative instrument made under the Act, as that non-legislative instrument exists or is in force at a particular time or from time to time (including a non-legislative instrument that does not exist when the legislative instrument is made).

Under paragraph 15J (2) (c) of the LA, the Explanatory Statement must contain a description of the incorporated documents and indicate how they may be obtained. A Table was included in the Explanatory Statement for the MOS listing and explaining the various incorporated documents. No new technical document incorporations are made by the MOS amendment that were not mentioned in the earlier Table.

### **Consultation**

Under regulation 11.280 in Subpart 11.J of CASR, if CASA intends to issue a MOS, CASA must, in effect, engage in public consultation on the draft MOS. This requirement also applies to a MOS amendment.

However, under paragraph 11.275 (1) (d), CASA is not obliged to consult if the Director of Aviation Safety (the *Director*) determines that the MOS is of a minor or machinery nature that does not substantially alter existing arrangements. In such circumstances, under subregulation 11.275 (2), CASA must publish the determination, and a statement of reasons for it, on the internet within 28 days after making the determination. The Director has made such a determination because the purpose of the MOS amendment is to make a range of updates, clarifications, corrections to the MOS, and to relocate into the MOS, with equivalent safety outcomes, provisions from the following existing, in force, Civil Aviation Orders or instrument (not every provision of the instrument mentioned below is relocated into the MOS):

- CASA 113/09 – Direction – flights over water
- Civil Aviation Order 20.11 (Emergency and life saving equipment and passenger control in emergencies)
- Civil Aviation Order 95.7.3 (Exemption of Certain Helicopters Engaged in Transferring Marine Pilots from Compliance with Subregulation 174B (2) of the *Civil Aviation Regulations 1988*).

The MOS amendment does not substantially alter the existing arrangements, whether as provided for by the MOS with effect on and from 2 December 2021, or as would be provided for on that date by the relevant provisions of those other instruments if they continued to exist transitionally and independently of the MOS.

There has, nevertheless, been considerable informal consultation with the aviation industry in the course of preparation of the amendments. Many of the amendments have arisen due to extensive feedback from the aviation industry to CASA via multiple communication channels, both individual direct feedback, and collective feedback from various working groups.

### **Regulation Impact Statement**

A Regulation Impact Statement (*RIS*) was prepared by CASA for the new Part 138 and this RIS also covered the MOS and the MOS amendment which the regulations empowered. The RIS was assessed by the Office of Best Practice Regulation (*OBPR*) as compliant with the Best Practice Regulation requirements and contained a level of analysis commensurate with the likely impacts (OBPR id: 24505). A copy of the RIS was included in the Explanatory Statement for Part 138: [Civil Aviation Safety Amendment \(Part 138\) Regulations 2018 \(legislation.gov.au\)](https://www.legislation.gov.au/ultra/idx/idx.html?doc=/australian-legal-requirements/2018/138/138020).

### **Statement of Compatibility with Human Rights**

A Statement of Compatibility with Human Rights is at Appendix 1. This concludes that the MOS amendment, as a set of minor or machinery amendments, is compatible with human rights.

### **Commencement and making**

The MOS amendment commences immediately after the commencement of Part 138 of CASR and the MOS on 2 December 2021. The empowerment for the MOS amendment, contained in Part 138, in particular in regulation 138.020, had not commenced when the MOS amendment was made. However, this is permitted under section 4 of the AIA which authorises the anticipatory making of a subordinate instrument in these circumstances, provided the instrument does not commence until (or after) the delayed empowering instrument has itself commenced.

The MOS amendment has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the  
Human Rights (Parliamentary Scrutiny) Act 2011*

### Part 138 MOS Amendment Instrument 2021 (No. 1)

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Legislative Instrument

The *Part 138 MOS Amendment Instrument 2021 (No. 1)* (the **MOS amendment**) amends the *Part 138 (Aerial Work Operations) Manual of Standards 2020* (the **MOS**).

The MOS, which commences on 2 December 2021, sets out the operational, procedural and safety risk management standards for the conduct of aerial work operations in aeroplanes and rotorcraft. The MOS was made under regulation 138.020 of Part 138 of the *Civil Aviation Safety Regulations 1998*. It consolidates the existing rules of the air and contains some new rules to enhance operational flexibility and improve aviation safety.

The MOS amendment, which also commences on 2 December 2021, is necessary to make a number of miscellaneous minor or machinery amendments to the MOS. Their purpose is to make a range of clarifications, corrections and updates to the MOS, and to relocate provisions into the MOS that are located in Civil Aviation Orders or other instruments that currently exist and are in force, some of which were previously embodied in the MOS but with errors or omissions. These MOS amendments do not substantially alter the existing arrangements, whether as provided for by the MOS with effect on and from 2 December 2021, or as would be provided for on that date by those other instruments if they continued to exist transitionally and independently of the MOS.

#### Human rights implications

When it was made, the Explanatory Statement for the MOS explained that, of their very nature in addressing aviation safety issues, its provisions may engage the following human rights:

- the right to life under Article 6 and the right to privacy and reputation under Article 17 of the International Covenant on Civil and Political Rights (the **ICCPR**)
- the right to work under Article 6 (1) and the right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights (the **ICESCR**).

That earlier Explanatory Statement concluded that the MOS was a legislative instrument that was compatible with human rights and, to the extent that it may also limit human rights, the limitations were reasonable, necessary and proportionate to ensure the safety and the integrity of the aviation safety system upon which all aviation operations rely.

The MOS amendment is also a legislative instrument but it contains only minor or machinery amendments as explained above, and these do not, of themselves, directly engage human rights,

nor do they increase any engagement with human rights already recorded in the earlier Explanatory Statement. The instrument is, in itself, therefore, compatible with human rights.

**Conclusion**

The MOS is a legislative instrument that is compatible with human rights.

## Details of the Part 138 MOS Amendment Instrument 2021 (No. 1)

### 1 Name of instrument

This section provides for the naming of the *Part 138 MOS Amendment Instrument 2021 (No. 1)* (the *MOS amendment*).

### 2 Commencement

This section provides for the commencement of the MOS amendment on 2 December 2021.

### 3 Amendment of Part 138 Manual of Standards

This section provides that Schedule 1 amends the *Part 138 (Aerial Work Operations) Manual of Standards 2020* (the *MOS*).

## Schedule 1 Amendments

### [1] After section 1.03 (new sections 1.03A, 1.03B and 1.03C)

Amendment 1 provides, in effect, that any incorporated instrument, document, FAR, ICAO document, AS/NZS standard, TSO, (E)TSO or ETSO is taken to be so incorporated as in force from time to time.

### [2] Section 1.04, definition of *significant change*

Amendment 2 corrects an incorrect regulation reference.

### [3] Subsection 1.07 (1), definition of *rescue operation*, or *rescue*

Amendment 3 substitutes the definition of *rescue operation*, or *rescue* to clarify that a rescue operation is an aerial work operation that is coordinated by a search and rescue body.

### [4] Subsection 1.07 (1), definition of *search operation*, or *search*

Amendment 4 substitutes the definition of *search operation*, or *search* to clarify that search operation is coordinated by a search and rescue body.

### [5] Section 3.01

Amendment 5 provides that the flight of an aircraft that is towing a thing, where the pilot in command of the aircraft meets the requirement mentioned in paragraph 91.210 (2) (a) of CASR, is not an aerial work operation.

### [6] Paragraph 4.02 (1) (c)

Amendment 6 provides that an aerial work certificate holder, who conducts an NVIS operation or an operation using a multi-engine rotorcraft with MTOW above 3 175 kg that is type certificated in the restricted category, must have a training and checking system.

### [6A] Section 7.03

Amendment 6A recasts section 7.03 which had previously imposed operations manual requirements more broadly than intended. As revised, a prescribed single-engine aeroplane (*PSEA*) may conduct aerial work operations if the aeroplane's type acceptance certificate states the aeroplane's relevant eligibility to be a PSEA. However, if the operations involve the carriage of 4 or more aerial work passengers in circumstances

mentioned in, and in accordance with, paragraphs 11.02 (1) (b) or paragraph 11.04 (1) (b) of the Part 138 MOS (IFR flights, and VFR flights at night), then the operator's operations manual must include the procedures for PSEA operations that are specified in Chapter 8 of the Part 135 MOS.

**[7] Subparagraph 9.05 (c) (i)**

Amendment 7 removes the serviceability requirement for a usage monitoring system because section 22.05 of the MOS contains the requirements for the serviceability of equipment.

**[8] Subparagraph 9.05 (c) (ii), the Note**

Amendment 8 adds a second explanatory Note as a signpost to section 22.05 about serviceability of equipment, and section 22.06 about a usage monitoring systems.

**[9] After paragraph 9.05 (e)**

Amendment 9 adds an explanatory Note about use of a throttle as a secondary or redundant means of fuel control.

**[10] Paragraph 9.06 (1) (c), Note 2**

Amendment 10 corrects an incorrect reference.

**[11] Paragraph 9.06 (1) (c), Note 3**

Amendment 11 corrects an incorrect reference.

**[12] Paragraph 9.16 (3) (a)**

Amendment 12 removes reference to "serviceable" auto-hover capability because section 22.05 of the MOS contains the requirements for the serviceability of equipment.

**[13] Paragraph 9.16 (3) (a), the Note**

Amendment 13 adds an explanatory Note as a signpost to section 22.05 about serviceability of equipment.

**[14] Subsection 9.20 (3)**

Amendment 14 provides that a flight that is a SAR operation using an automatic flight control system (an *AFCS*) must be discontinued immediately if there is a malfunction in the AFCS, unless the aircraft flight manual (AFM) permits the continued use of the auto-hover with transition mode capability despite the AFCS malfunction.

**[15] Chapter 9, Division 6, the heading**

Amendment 15 provides for a more accurate division heading.

**[16] After section 11.06 (new section 11.07)**

Amendment 16 provides that one or more suitable forced landing areas must be available and usable by a rotorcraft at all stages of a flight with passengers conducted over water.

**[17] Paragraph 13.04 (3) (c)**

Amendment 17 corrects an editorial error.

**[18] Section 14.02**

Amendment 18 clarifies the previous requirements in sections 14.02 (seatbelts) and 15.03 (external loads). It describes when flight crew members (FCMs) and others must wear seatbelts, and how a person who is an external load is to be safely restrained. Subsection 14.02 (3) replicates the requirements in section 15.03 (see Amendment 19) and sets out the circumstances and requirements for use of a rescue harness in certain

operations. Subsection 14.02 (4) provides that the restraint device requirements do not apply for a Class D external load operation that involves a person exiting or entering an aircraft in flight using a rope or ladder attached to the rotorcraft (rappelling), provided that the safety requirements of subsection 15.06 (6) are complied with.

**[19] Section 15.03**

Amendment 19 repeals the content of section 15.03 and provides that the section is reserved for future use. The content of the section is moved to subsection 14.03 (3) (see Amendment 18).

**[20] Paragraph 15.06 (4) (a)**

Amendment 20 deletes paragraph 15.06 (4) (a) which is redundant because of the pre-existing approval process provided for under subsection 15.04 (2).

**[21] Paragraph 15.06 (5) (a)**

Amendment 21 is consequential on Amendment 20.

**[22] Subsection 15.08 (4)**

Amendment 22 corrects an incorrect reference.

**[23] Subsection 17.02 (1)**

Amendment 23 clarifies that the Division applies only in relation to a task specialist operation that involves aerial mustering below 500 ft AGL in a rotorcraft. The requirements do not apply to aeroplane mustering operations.

**[24] After paragraph 17.02 (2) (a)**

Amendment 24 adds an explanatory Note concerning categories of aircraft and type certifications.

**[25] Paragraph 17.02 (2) (b)**

**[26] Paragraph 17.02 (2) (c)**

**[27] Paragraph 17.02 (2) (c)**

**[28] Paragraph 17.02 (3) (a)**

**[29] Paragraph 17.02 (3) (a)**

**[30] Paragraph 17.02 (3) (b)**

Amendments 25 to 30 replace erroneous references to “aircraft” with references to “rotorcraft”. These amendments are consequential on Amendment 23.

**[31] Subsection 17.07 (9)**

Amendment 31 is consequential on Amendment 30 which provides for an exception to the existing requirement under subsection 17.07 (9) that an aerial work operation whose purpose involves the discharge of a firearm from an aircraft must not occur within 3 NM of occupied buildings, populous areas or public gatherings.

**[32] After subsection 17.07 (9) (new subsections 17.07 (10), (11) and (12))**

Amendment 32 provides the circumstances in which the requirement in subsection 17.07 (9) does not apply. The shooter must be engaged by an *aerial shooting organisation* which must have an *aerial shooting safety management plan* and a specific *aerial shooting plan*. These terms are defined, and the plans must be made available to CASA on written request to the operator or the aerial shooting organisation. The plans



must be given to the shooter, the operator, the pilot in command and the occupier. The latter must have no objections to the proposed operation or the aerial shooting plan.

**[33] Paragraph 17.09 (1) (b)**

Amendment 33 provides that Division 4 applies to a task specialist marine pilot transfer operation conducted at night only, rather than generally.

**[34] Paragraph 17.09 (3) (b)**

Amendment 34 removes reference to “serviceable” autopilot because section 22.05 contains requirements for the serviceability of equipment.

**[35] After paragraph 17.09 (3) (b)**

Amendment 35 adds an explanatory Note as a signpost to section 22.05.

**[36] After subsection 17.09 (3)**

Amendment 36 provides that, with effect from the beginning of 2 December 2023, a single-engine rotorcraft must be equipped with a usage monitoring system (the requirements for which are in section 22.06).

**[37] Paragraph 18.04 (a)**

Amendment 37 corrects an erroneous reference.

**[38] Paragraph 18.04 (c)**

Amendment 38 corrects an erroneous reference.

**[39] Subsection 22.03 (3)**

**[40] Subsection 22.03 (3)**

**[41] Paragraph 22.03 (4) (b)**

Amendments 39 to 41 replace erroneous references to “aeroplane” with references to ‘aircraft’. Section 22.03 is intended to apply to all aircraft to which the MOS applies.

**[42] Section 22.05**

Amendment 42 more clearly mandates that any equipment required by the MOS to be fitted to, or carried on, an aircraft for a flight must be operative unless another provision of the civil aviation legislation provides otherwise, or a permissible unserviceability is involved.

**[43] Section 22.06, the heading**

Amendment 43 provides for a more accurate section heading.

**[44] Subsection 22.06 (1)**

Amendment 44 provides that this section applies to a rotorcraft conducting an aerial work operation if it is required by the civil aviation legislation to be fitted with a usage monitoring system.

**[45] Subsection 22.06 (2), the Note**

Amendment 45 removes a superfluous explanatory Note.

**[46] Subsection 22.08 (2)**

Amendment 46 removes a superfluous reference to the head of power for the Chapter.

**[47] Paragraph 23.02 (3) (a)**

**[48] Subsection 23.02 (4)**

**[49] Subsection 23.02 (4)**

Amendments 47 to 49 clarify that references to a “competency check” are to a “general emergency competency check”.

**[50] Subsection 23.03 (4)**

Amendment 50 corrects an incorrect reference.

**[51] Paragraph 23.05 (2) (a)**

Amendment 51 is similar to Amendments 47, 48 and 49.

**[52] Paragraph 23.05 (2) (a)**

Amendment 52 corrects an incorrect reference.

**[53] After subsection 23.05 (2)**

Amendment 53 provides that recurrent training and checking for the general emergency training matters mentioned in paragraphs 23.02 (2) (e) and (f) does not need to include in-water practical training and checking, except for the training and checking in underwater escape. In-water life jacket and life raft training is only conducted when a pilot conducts their first check of general competency.

**[54] Subsection 23.05 (4)**

**[55] Subsection 23.05 (5)**

**[56] Section 23.06**

Amendments 54 to 56 add references to a “competency” check. This ensures the correct kind of check event is referenced.

**[57] Paragraph 23.10 (1) (b)**

Amendment 57 expands the persons authorised to conduct general emergency training or a competency assessment, and provides the criteria such persons must meet.

**[58] Subsection 23.10 (3)**

**[59] Subsection 23.10 (3)**

Amendments 58 and 59 require a person authorised to conduct general emergency training or a competency assessment to be nominated in the operator’s operations manual. The nomination must state that the person meets the stipulated requirements.

**[60] Subsection 23.11 (1)**

Amendment 60 provides that CASA may test the person nominated to conduct general emergency training or a competency assessment for an operator. This amendment is related to Amendments 57 to 59.

**[61] Section 24.02**

Amendment 61 corrects the timeframes in which air crew members must complete competency checks, allowing them to be every 12 months, including for IFR and NVFR flights, as well as VFR flights.